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IN THE
COURT OF APPEALS OF INDIANA

PORTIA JACKSON, Administratrix of the Estate of PETER C. SHOLAR, Deceased, and ROCHELLE SHOLAR,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 49A02-0508-CV-753
RAILROAD FRICTION PRODUCTS CORPORATION,	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Kenneth H. Johnson, Judge
Cause No. 49D02-9601-MI-001-288

August 31, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Portia Jackson, as Administratrix of the Estate of Peter C. Sholar, and Rochelle Sholar (collectively "Jackson") appeal the trial court's order granting summary judgment in favor of Railroad Friction Products Corporation ("RFPC"). Jackson raises two issues for our review, which we consolidate and restate as whether the trial court properly granted RFPC's motion for summary judgment. We affirm.

Facts and Procedural History

RFPC was incorporated in 1954. Johns-Manville Corporation ("Johns-Manville") and Westinghouse Air Brake Company ("WABCO") each owned fifty percent of RFPC's stock. In 1978, WABCO sold its interest in RFPC to American Standard, Inc. Westinghouse Air Brake Technologies Corporation purchased American Standard's interest in RFPC in 1990, and Johns-Manville's interest in 1992. As of today, Johns-Manville and WABCO have no interest in RFPC.

During its existence, RFPC has purchased composition tread brake shoes for railroad cars from Johns-Manville. RFPC sold these brake shoes without change under the brand name COBRA. From 1959 to 1980, the backing stock of most COBRA brand brake shoes contained asbestos. All asbestos was removed from COBRA brake shoes in 1980. Although RFPC sold COBRA brake shoes, it did not manufacture asbestos-containing brake shoes, nor did it mine raw asbestos.

From 1963 to 1995, Peter Sholar worked at the railroad facility located in Beech Grove, Indiana, where he serviced railroad cars. Raymond Stroud and Edward Lange both stated that they worked with Sholar in the tank shop of the Beech Grove facility. Stroud

worked with Sholar for six or seven years, and Lange worked with Sholar for roughly six months in 1966. Both Stroud and Lange saw Sholar change the brake shoes of railroad cars.

Stroud could not recall the names of the manufacturers or the brand names of any of the brake shoes he worked with at the Beech Grove facility. He specifically stated that he did not know if Sholar worked with or around products manufactured or sold by RFPC. When the name COBRA was mentioned, Stroud said this sounded familiar and thought it might be the name of a brake shoe, but he concluded by saying, "I can't identify it with anything." Appellant's Appendix at 1010.

At his deposition in 2004, Lange indicated that he had no personal knowledge of whether the work Sholar did at the Beech Grove facility would have exposed him to asbestos. He stated that he did not know who manufactured the brake shoes that were used at the Beech Grove facility or if those brake shoes contained asbestos. However, at his deposition given in 2001 in another case, Lange stated that COBRA brake shoes, along with others, were used at the Beech Grove facility. At one point, Lange said, "[W]e used Cobra, Westinghouse shoes on all of our equipment because we ordered from all three manufacturers." Id. at 1066. Later in the deposition, though, Lange indicated that there were three manufacturers of brake shoes used at the Beech Grove facility, and those manufacturers were COBRA, WABCO, and New York Air Brake.

On October 19, 1998, Sholar was diagnosed as having contracted lung cancer as a result of his exposure to asbestos. Sholar died of lung cancer on April 1, 1999. Jackson filed a complaint against RFPC, along with a number of other parties, on November 3, 2000. The complaint alleged claims for wrongful death and loss of consortium. RFPC filed a motion for

summary judgment on July 12, 2004, arguing that the statute of repose found in Indiana Code section 34-20-3-1(b) barred Jackson's claims. RFPC also argued that it was entitled to summary judgment because there was no evidence Sholar inhaled asbestos dust from RFPC's product. The trial court held a hearing on RFPC's motion for summary judgment on June 13, 2005, and issued an order granting that motion on July 8, 2005. This appeal ensued.

Discussion and Decision

Jackson argues that the trial court erred in granting RFPC's motion for summary judgment. We disagree.

I. Standard of Review

When we determine the propriety of an order granting summary judgment, we use the same standard of review as the trial court. Ryan v. Brown, 827 N.E.2d 112, 116 (Ind. Ct. App. 2005). Summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C). "The party moving for summary judgment has the burden of making a prima facie showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." Ryan, 827 N.E.2d at 117. If the moving party meets these two requirements, then the burden shifts to the non-moving party to show the existence of a genuine issue of material fact by setting forth specifically designated facts. Id. "We must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmoving party, and resolve all doubts against the moving party." Id. Summary judgment will be affirmed if it is sustainable on any theory or basis found in the evidentiary matter designated to the trial court. Inlow v. Inlow, 797 N.E.2d 810, 815-16 (Ind. Ct. App. 2003), trans. denied.

II. Statute of Repose

In its motion for summary judgment, RFPC argued that the statute of repose found in Indiana Code section 34-20-3-1(b) barred Jackson's claims. That statute provides:

> [A] product liability action must be commenced:
>
> (1) within two (2) years after the cause of action accrues; or
>
> (2) within ten (10) years after the delivery of the product to the initial user or consumer.
>
> However, if the cause of action accrues at least eight (8) years but less than ten (10) years after that initial delivery, the action may be commenced at any time within two (2) years after the cause of action accrues.

Ind. Code § 34-20-3-1(b). Jackson contends that the viability of her claims is controlled by Indiana Code section 34-20-3-2. That statute states:

> (a) A product liability action that is based on:
> (1) property damage resulting from asbestos; or
> (2) personal injury, disability, disease, or death resulting from exposure to asbestos;
> must be commenced within two (2) years after the cause of action accrues.
> ***
> (b) A product liability action for personal injury, disability, disease, or death resulting from exposure to asbestos accrues on the date when the injured person knows that the person has an asbestos related disease or injury.
> ***
> (d) This section applies only to product liability actions against:
> (1) persons who mined and sold commercial asbestos . . . .

Ind. Code § 34-20-3-2.

Our supreme court has held that Indiana Code section 34-20-3-2 only applies in product liability actions brought against those persons who both mine and sell commercial asbestos. AlliedSignal, Inc. v. Ott, 785 N.E.2d 1068, 1073 (Ind. 2003). Product liability actions filed against individuals who only sell asbestos-containing products are left within the

ambit of Indiana Code section 34-20-3-1. Id. The evidence reveals that although RFPC sold asbestos-containing products, it never mined asbestos. Despite this, Jackson asserts that Indiana Code section 34-20-3-2 controls here. She makes two arguments for why we should conclude that RFPC was a miner of asbestos.

First, Jackson points out that RFPC was created by WABCO and Johns-Manville, with each entity owning fifty percent of RFPC's stock. Johns-Manville continued to own a share of RFPC until 1992. Without citation to the record, Jackson asserts that Johns-Manville was an asbestos mining company. Jackson points out that under Indiana Code section 34-6-22-77(a) the word "manufacturer" means a person or entity who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product or a component part of a product before the sale of the product to a user or consumer. Indiana Code section 34-6-2-77(a)(4) further provides that the word "manufacturer" includes a seller who "is owned in whole or significant part by the manufacturer . . . ." Jackson concludes that because RFPC was owned in significant part by Johns-Manville, pursuant to Indiana Code section 34-6-2-77(a)(4), it was a manufacturer, and thus, Indiana Code section 34-20-3-2 applies here.

Jackson's argument is based on the false assumption that if one is a manufacturer under Indiana Code section 34-6-2-77, then one is also a miner. Indiana Code section 34-6-2-77(a) provides that a manufacturer is a person who designs, assembles, fabricates, produces, constructs, or otherwise prepares a product. It does not say that a manufacturer is also a person involved in mining. The fact that RFPC may be a manufacturer under Indiana Code section 34-6-2-77(a)(4) because of its relationship with Johns-Manville does not mean

that it is a miner of asbestos under Indiana Code section 34-20-3-2.

Jackson next argues that under Indiana Code section 34-20-2-4 we should conclude that RFPC was a miner of asbestos. Indiana Code section 34-20-2-4 provides as follows:

> If a court is unable to hold jurisdiction over a particular manufacturer of a product or part of a product alleged to be defective, then that manufacturer's principal distributor or seller over whom a court may hold jurisdiction shall be considered, for purposes of this chapter, the manufacturer of the product.

Here the alleged defective product was the COBRA brake shoe manufactured by Johns-Manville and distributed by RFPC. Jackson alleges that jurisdiction over Johns-Manville cannot be had because that company is in bankruptcy. She also alleges that RFPC was Johns-Manville's principal distributor. Based on this, Jackson concludes that pursuant to Indiana Code section 34-20-2-4, RFPC should be considered the manufacturer of COBRA brake shoes, and that Indiana Code section 34-20-3-2 applies here.

Initially, we note that Jackson has presented no evidence showing that RFPC was the principal distributor for Johns-Manville at the time Sholar was allegedly exposed to asbestos dust from COBRA brake shoes. Even if we assume RFPC was Johns-Manville's principal distributor, Jackson's argument still fails. Jackson's position is again based on the assumption that if one is a manufacturer one is also a miner. We have already determined that this is a false assumption. Just because a business manufactures a product containing asbestos does not mean the business is also a miner of asbestos. Thus, even if RFPC could be considered a manufacturer under Indiana Code section 34-20-2-4, this does not mean it is a miner of asbestos under Indiana Code section 34-20-3-2.

Additionally, we note that Indiana Code section 34-20-2-4 uses the language "for the

purposes of this chapter," which indicates that the provisions of this statute only apply to chapter two of Indiana's Product Liability Act. However, the relevant statues at issue here, Indiana Code sections 34-20-3-1 and –2, which will determine whether Jackson's claims are time barred, are found in chapter three of the Product Liability Act. RFPC's status as a manufacturer under Indiana Code section 34-20-2-4 then has no bearing on our determination whether Jackson's claims are time barred under Indiana Code section 34-20-3-1 or section 34-20-3-2. Therefore, because RFPC only sold and did not mine asbestos containing products, Indiana Code section 34-20-3-1 controls the determination of whether Jackson's claims are time barred.

Under Indiana Code section 34-20-3-1(b)(2) a product liability action must be commenced within ten years after the delivery of the product to the initial user or consumer. Sholar worked at the Beech Grove facility from 1963 to 1995. Jackson alleges that Sholar was exposed to asbestos dust from COBRA brake shoes sold by RFPC. COBRA brake shoes contained asbestos until 1980. At the latest, Sholar was required to file his claim by December 31, 1990. Sholar learned that he had contracted lung cancer due to his exposure to asbestos on October 19, 1998. Jackson did not file her complaint until November 3, 2000. Because Jackson did not file her complaint within ten years after the delivery of the COBRA brake shoes, her claims are barred.

Nevertheless, our supreme court has held that when, as in this case, a plaintiff's claims are filed after the expiration of the period of repose, summary judgment for the defendant is improper if "a reasonably experienced physician could have diagnosed [the plaintiff] with an asbestos-related illness or disease within the ten-year statue of respose, yet [the plaintiff] had

no reason to know of the diagnosable condition until the ten-year period had expired." Black v. A.C.&S., Inc., 785 N.E.2d 1084, 1087 (Ind. 2003). Jackson has waived this issue because she makes no argument in her brief regarding whether a reasonably experienced physician could have diagnosed Sholar with an asbestos-related illness within the ten-year statue of repose. See French v. State, 778 N.E.2d 816, 826 (Ind. 2002)(Appellant waived issue by not raising it in his principal brief); Hepburn v. Tri-County Bank, 842 N.E.2d 378, 380 n.1 (Ind. Ct. App. 2006)(concluding that any argument an appellant fails to raise in his initial brief is waived for appeal). Therefore, the trial court properly granted RFPC's motion for summary judgment.[1]

III. Exposure to RFPC's Product

In its motion for summary judgment, RFPC argued that Jackson could not prove the causation element of her claim because she could not show that Sholar inhaled asbestos dust from a product distributed by RFPC. Thus, RFPC concluded that it was entitled to summary judgment. Jackson contends that the trial court erred in granting RFPC's motion of summary judgment because a genuine issue of material fact exists as to whether Sholar was exposed to a RFPC product. Although we have already concluded that RFPC was entitled to summary judgment because the statute of repose bars Jackson's claims, we will consider this issue.

In order to avoid summary judgment, a plaintiff must produce evidence sufficient to

[1] Although we have concluded that Indiana Code section 34-20-3-2 does not apply here, if it did, Jackson's claims would be barred under that statute as well. Indiana Code section 34-20-3-2(a) provides that a product liability action based on personal injury or death resulting from exposure to asbestos must be commenced within two years after the cause of action accrues. A cause of action accrues "when the injured person knows that the person has an asbestos related disease or injury." Ind. Code § 34-20-3-2(b). Sholar's cause of action accrued on October 19, 1998, when he was diagnosed with lung cancer caused by his exposure to asbestos. Jackson did not file her complaint until November 3, 2000. Because Jackson's complaint was filed more than two years after the cause of action

support an inference that he or she inhaled asbestos dust from the defendant's product. Fulk v. Allied Signal, Inc., 755 N.E.2d 1198, 1203 (Ind. Ct. App. 2001). Jackson relies on the deposition testimony of Stroud and Lange to show that Sholar inhaled asbestos dust from RFPC's product. Lange and Stroud both worked with Sholar in the tank shop at the Beech Grove facility. Stroud worked with Sholar for six or seven years, and Lange worked with Sholar in 1966 for six months. Both Stroud and Lange stated that they saw Sholar change the brake shoes on a railroad car.

At his deposition, Stroud testified that he did not remember the names of the manufacturers or the brand names of any of the brake shoes he worked with at the Beech Grove facility, and he stated that he did not know if Sholar worked with or around products manufactured or sold by RFPC. Stroud recognized the name COBRA and thought it might be the name of a brake shoe, but he was not certain of this and could not specifically identify the name with anything. Stroud's testimony does not support an inference that Sholar inhaled asbestos dust from COBRA brake shoes distributed by RFPC because it does not show that Sholar ever worked with or around COBRA brake shoes that contained asbestos.

Lange testified at his 2004 deposition that he had no personal knowledge of whether the work Sholar did at the Beech Grove facility would have exposed him to asbestos, and that he did not know who manufactured the brake shoes that were used at the Beech Grove facility or if those brake shoes contained asbestos. Jackson, though, notes that at his 2001 deposition, Lange stated, "[W]e used Cobra, Westinghouse shoes on all of our equipment because we ordered from all three manufacturers." Appellant's App. at 1066. Based on this,

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accrued, her claims would be barred under Indiana Code section 34-20-3-2.

Jackson asserts that "Cobra shoes were the only ones used at Beech Grove." Brief of Appellants, Portia Jackson and Rochelle Sholar at 9. Relying on Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905 (Ind. 2001), Jackson contends that a plaintiff's mere presence in an area where an asbestos-containing product is used creates a jury question as to whether the plaintiff was exposed to asbestos dust from that product. Because Sholar was present in a place where COBRA brakes shoes were being used, Jackson contends that summary judgment in RFPC's favor was improper.

In Cobb, Cobb worked as a pipe fitter from 1955 to 1995. He was diagnosed with asbestosis in 1989 and lung cancer in 1995. Cobb filed a complaint against Owens Corning in 1996. Owens Corning filed a motion for summary judgment arguing that Cobb failed to present any evidence showing that he was exposed to asbestos-containing products manufactured or distributed by Owens Corning. The trial court denied this motion, and Owens Corning appealed.

Our supreme court noted that at his deposition, Cobb stated that he was first exposed to Kaylo, an Owens Corning product that contained asbestos, in 1963 or 1964 while working as a pipe fitter for Indianapolis Public Schools. Cobb specifically remembered seeing boxes of Kaylo at various work sites. Cobb did not personally install any Kaylo product, but he worked with others who did. Cobb also testified that he might have been exposed to asbestos from Kaylo while removing pipe covering. Our supreme court stated:

> Cobb's testimony established that Cobb worked at multiple sites where asbestos products were used; Cobb worked near people installing pipe insulation containing asbestos; and boxes of Kaylo pipe insulation products were present on the work sites. We find it to be a reasonable inference, not conjecture or speculation, that the insulation from the Kaylo boxes was being

> installed at the worksites where it was present and not simply being stored there.

Id. at 910. The court concluded that "Cobb's evidence was sufficient to establish a genuine issue of material fact as to whether Owens Corning's asbestos caused his injuries." Id.

Cobb is factually distinguishable. Unlike Cobb, Sholar did not testify that he worked with or around COBRA brake shoes that contained asbestos and were distributed by RFPC. Lange stated that COBRA brake shoes were used at the Beech Grove facility, but his testimony never specifically stated when COBRA brake shoes were used at the facility. Lange only worked with Sholar for six months in 1966, and he did not say in his 2001 or 2004 deposition that COBRA brake shoes were being used or were even present at the Beech Grove facility during that period of time. Nowhere in his 2001 or 2004 deposition testimony does Lange state that in 1966, he saw Sholar or anyone around Sholar using COBRA brake shoes distributed by RFPC.

We disagree with Jackson's assertion that COBRA brake shoes were the only brake shoes used at the Beech Grove facility. The statement by Lange at his 2001 deposition that Jackson relies on is ambiguous at best. Lange says, "we used Cobra, Westinghouse shoes on all of our equipment . . . ." Appellant's App. at 1066. Lange could be saying that both COBRA brake shoes and Westinghouse brake shoes were used on all equipment. Lange might also be saying that COBRA brake shoes manufactured or distributed by Westinghouse were used on all equipment. If that were the case, then this statement would implicate Westinghouse rather than RFPC. At the time Lange made this statement, he was being asked about the components that were used to repair Budd railroad cars, which is a specific type of

railroad car. Lange could be indicating that COBRA brake shoes were only used on Budd railroad cars, but that other types of brake shoes were used for other railroad cars.

Other statements made by Lange at his 2001 deposition suggest that COBRA brake shoes were not the only type of brake shoes used at the Beech Grove facility. At one point Lange says, "We used Cobra brake shoes, along with others." Id. at 1064. Later in the deposition Lange stated that COBRA, WABCO, and New York Air Brake were the only three manufacturers of brake shoes used at the Beech Grove facility. Presumably each of these companies manufactured a different brand of brake shoe.

Although Lange's 2001 deposition testimony suggests that COBRA brake shoes were present at the Beech Grove facility, it does not specify when COBRA brake shoes were present, whether Sholar was present when COBRA brake shoes were used, or whether Sholar ever actually used or installed a COBRA brake shoe. Lange's testimony does not support an inference that Sholar inhaled asbestos dust from COBRA brake shoes distributed by RFPC. Therefore, the trial court properly granted RFPC's motion for summary judgment.

Conclusion

The statute of repose found in Indiana Code section 34-20-3-1(b) bars Jackson's claims. Jackson cannot prove the causation element of her claims because she cannot show that Sholar was exposed to asbestos dust from COBRA brake shoes distributed by RFPC. The trial court's order granting RFPC's motion for summary judgment is therefore affirmed.

Affirmed.

SHARPNACK, J., and NAJAM, J., concur.